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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BRIANA M. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GINA S.,

Defendant and Appellant.

D045098

(Super. Ct. No. NJ12879A, B)

APPEAL from orders of the Superior Court of San Diego County, Michael J. Imhoff,
Judge. Affirmed.

Gina S. appeals from jurisdictional and dispositional orders of the juvenile court asserting jurisdiction over, and ordering the removal from her custody of, her daughters, Briana and Alana. She contends there was insufficient evidence to support the court's

exercise of jurisdiction over the girls or to support its findings that removal was necessary to protect them. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

Briana (born April 1997) and Alana (born July 2001) are the children of Gina and her husband, Eric. In January 2004, Gina was arrested for domestic violence after she tried to choke Eric during an argument. (All relevant dates are in 2004 except as otherwise noted.) In February, Gina told Eric that she planned to file for a divorce and Eric threatened her. Later that month, Eric was arrested for shoving Gina and injuring her back while she was visiting him and the children, after which she obtained a restraining order against him.

Thereafter, Gina and Eric entered into voluntary services case plans with the San Diego County Health and Human Services Agency (the Agency), requiring them to participate in counseling, case management, substance abuse assessment and treatment, parent training, and other services and to maintain separate households. (Unfortunately, the record does not include a copy of the plans despite Gina's request that the record be augmented to include it. Gina contends that there is thus no evidence that she actually entered into such an agreement. She is mistaken; the social worker's reports (including the one on which she submitted), the Family Court Services report and the verified petitions constitute evidence that such an agreement exists. In any event, Gina did not object to the absence of the agreement or the court's reliance on it in the proceedings below.)

In April, Eric violated the restraining order numerous times and on one occasion Gina reported to police that Eric had punched her in the chest. The following month, Eric told the social worker that Gina was taking Oxycontin and other prescription drugs, which sometimes

rendered her unable to get out of bed to take care of the girls. Briana similarly reported that she would get herself up in the morning and make herself breakfast if Gina could not get up and that Gina sometimes slept during the day when she and Alana were at home. She also indicated that on one occasion Alana picked up Gina's medicine from the floor, but she took it away from Alana and threw it away. A friend of Gina's told the social worker that she was concerned about Gina's use of prescription medications. At about the same time, Gina refused to take a drug test when asked to do so by the social worker.

Gina and the girls ultimately moved in with Gina's mother, who lives in Orange County, although Gina periodically stayed with a friend or family in San Diego. On July 6, Gina left Alana at her mother's house and took Briana with her to stay at the Vista home of Terri, a male friend who was also the girls' godfather. The next day, however, Gina called her mother, saying that the arrangement had not worked out and asking for a ride. After arriving at Terri's home, the mother became concerned that Gina was overly medicated so she took Gina to the hospital for examination; however, Gina left with Briana while her mother was talking to a nurse. According to Gina, she had taken Briana to get a hotdog and, after she returned and could not find her mother, she got a ride from Terri back to his house. Shortly thereafter, Gina got into a fight with Terri; according to Gina, Terri locked her and Briana in a room for a period of time and then "threw them outside and locked them out." Gina again called her mother to ask for a ride; at about the same time, Terri called the Agency to report that Gina was under the influence and "acting out of control."

The social worker went to Terri's home just as Gina's mother was picking Gina and Briana up. Both Gina's mother and Terri told the social worker that they suspected Gina was

abusing her prescription medications. The social worker checked with a psychiatric nurse at Kaiser, Gina's medical provider, who confirmed having similar concerns; the nurse reported that Gina had been prescribed numerous medications, including Vicodin and Oxycontin, for depression, panic attacks and pain and that on at least two occasions Gina claimed that she needed refills because her medications had been lost or stolen.

In early July, the Agency filed petitions on the girls' behalf under Welfare and Institutions Code section 300, alleging that the children were at substantial risk of serious physical harm or illness as a result of their parents' inability to supervise or protect them. (All further statutory references are to the Welfare and Institutions Code.) Specifically, the petitions alleged that the girls had been exposed to violent confrontations between Gina and Eric on two separate occasions in January and February, that Eric had violated the restraining order requiring him to stay away from Gina and that the parents had failed to comply with the terms of their voluntary services plans. The Agency detained the girls in separate foster homes. At the detention hearing, the court found that continued detention was necessary to protect the girls.

At a post-detention hearing interview, Gina admitted to the social worker that she had used drugs once with Eric (although Eric reported that she had used cocaine and ecstasy in the past). Gina also said that she drank, with her heaviest alcohol usage in the preceding year, when she was convicted of driving under the influence, and that she continued to drink even though she was not supposed to do so while she was on her prescription medications. She acknowledged that her relationship with Eric was having an adverse effect on the girls, especially Briana, and felt that the Agency's intervention would be helpful to the girls and to

her. She also told the social worker that she had had one prior relationship with a man before she married Eric and that it too had been abusive.

The social worker concluded that the parents' use of illicit and/or prescribed drugs was "incongruent with safe parenting" and opined that the children could not be safely placed with either of their parents until they had addressed "their domestic violence and personal issues that contributed to the children's removal from their care." She recommended that the parents submit to psychological evaluations after being documented as drug free for 90 days so that the Agency could assess what services they needed to reunify and that in the interim they have supervised visitation with the children.

At the jurisdictional and dispositional hearing, both parents submitted on the social worker's reports. The court made jurisdictional findings that the girls are persons described in section 300 and removed the girls from their parents' custody pursuant to section 361, subdivision (c)(1). It ordered the girls to continue their placement in foster care, subject to the Agency's discretion to place the girls with an approved relative. It gave the Agency discretion to lift the requirement that visitation be supervised and encouraged the Agency to place Briana in therapy. It also ordered the parents to refrain from using alcohol or illegal substances, to participate in the court's Substance Abuse Recovery Management System (SARMS), to submit to random drug and alcohol testing and to comply with their services plan. The parents signed a revised case plan. Gina appeals the court's jurisdictional and dispositional orders. (Eric has not appealed.)

DISCUSSION

Where, as here, a parent challenges the juvenile court's jurisdictional and dispositional findings, we must look to see if substantial evidence, contradicted or uncontradicted, supports those findings. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733.) In making this determination, we must review the record in the light most favorable to the court's determinations and draw all reasonable inferences from the evidence in support of the court's findings and orders. (*Ibid.*) In raising such a challenge, the appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the juvenile court's orders. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

1. *Jurisdictional Findings and Orders*

As relevant here, section 300, subdivision (b), provides a basis for juvenile court jurisdiction over a child where she has suffered, or where there is a substantial risk she will suffer, serious physical harm or illness as a result of the parent's failure to adequately supervise or protect her. This statutory provision is intended not only to protect children who are currently being abused or neglected, but also "*to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.*" (§ 300.2, italics added.) In reviewing a challenge to a jurisdictional finding, the question is whether the circumstances at the time of the hearing "subject the minor to the defined risk of harm." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.)

Gina contends that the evidence was insufficient to establish a present risk of harm to the girls at the time of the jurisdictional hearing. She asserts that because the primary basis for the petitions was two instances of domestic violence with Eric (the first of which the girls

slept through), the children were only at risk if she and Eric were together. She thus contends that there was no continuing risk of harm to the girls because she and Eric had separated, she had a restraining order against him and she was in the process of filing for divorce. Gina's argument is not well taken, for several reasons.

First, although the petitions only specifically alleged two incidents of domestic violence between Gina and Eric (the first of which involved Gina's domestic violence against Eric), the record shows that there were many other prior incidents of violence between them; in fact, the Oceanside police told the social worker that the family had a history of serious domestic disputes over the preceding ten-year period. Briana also indicated that her parents argued "a lot" and hurt each other. Although these other matters were not specifically alleged in the section 300 petitions, the juvenile court was entitled to consider such past circumstances in determining whether the girls presently needed protection. (*In re S.O.*, *supra*, 103 Cal.App.4th at p. 461; *In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The fact that Gina had continued to live in Eric's home with the girls after recurring incidents of domestic violence and after obtaining a restraining order against him also raises some question as to the steadfastness of her commitment not to have contact with him in the future.

Even if Gina is truly committed to not having contact with Eric, there is other evidence that would nonetheless support the juvenile court's finding that the girls were at risk of being harmed. Gina admitted that her prior romantic relationship with a man was also abusive and the evidence shows that despite her flight from Terri's house after she contended

that Terri had locked her and Briana in a room, threw them out of the house and locked them out, she still turned to Terri for a ride back to his house after she was unable to locate her mother at the hospital. Thus, even if Gina has truly removed Eric from her life, the evidence suggests that she has a history of making poor choices that, if continued, creates a risk of harm to her children.

Moreover, there is no indication in the record that the juvenile court relied solely on the prior incidents of domestic violence as the basis for its jurisdictional findings. The evidence shows that Gina had not taken advantage of the services offered to her under her voluntary service plan, that she had an on-going substance abuse problem involving some very serious medications and that this problem had left her unable to care for the girls on at least several occasions. The evidence also suggests that Gina failed to take precautions to ensure that the girls would not have access to her medications. This evidence is more than ample to support the juvenile court's jurisdictional findings.

2. *Dispositional Findings and Orders*

Before removing a child from the custody of his or her parent, the court must find by clear and convincing evidence that a child would be at substantial risk of harm if returned home and removal is the only way to protect the child's physical or emotional well being. (§ 361, subd. (c)(1); *In re Kristen H.* (1996) 46 Cal.App.4th 1635, 1654.) The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate; rather, the focus of the statute is on averting harm to the child. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136.) A court's jurisdictional findings are *prima facie* evidence the child cannot safely remain in the home. (§ 361, subd. (c)(1).) Whether the

circumstances presented a risk of harm to the children is a factual issue. On appeal, we consider whether substantial evidence supports the juvenile court's determination that the evidence supported the girls' removal from Gina's custody, bearing in mind the heightened burden of proof. (*In re Kristin H.*, *supra*, 46 Cal.App.4th at p. 1654.)

The evidence described above in support of the court's jurisdictional findings is equally sufficient to support the court's findings that removal was necessary to protect the girls from a substantial risk of serious harm. Further, in light of Gina's almost complete failure to comply with her voluntary services plan or the requirements of the court's order at the detention hearing, the juvenile court could reasonably have found that less drastic measures short of removal would not have been sufficient to protect the girls.

DISPOSITION

The juvenile court's jurisdictional and dispositional orders are affirmed.

McINTYRE, J.

WE CONCUR:

HALLER, Acting P.J.

IRION, J.